

No. 45244-8-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

WILLIE DARNELL BLAKENEY,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 12-1-03948-0  
The Honorable Kathryn Nelson, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it allowed the State to present prior consistent statements made by the complaining witness immediately following the charged incident.
2. The trial court erred when it found that prior consistent statements made by the complaining witness were admissible to rebut an assertion by the defense of recent fabrication.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did the trial court err when it allowed the State to present prior consistent statements made by the complaining witness, where there was no charge by the defense that the complaining witness recently fabricated her allegations, where there was no assertion that a recent event occurred that motivated the complaining witness to lie, and where the legal consequences of the complaining witness' prior statements were obvious at the time she made them?  
(Assignments of Error 1 & 2)

## **III. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The State charged Willie Darnell Blakeney by Information with one count of second degree rape (RCW 9A.44.050(1)(a)). (CP 1)

Following a CrR 3.5 hearing, the trial court found that custodial statements Blakeney made to police were admissible at trial. (RP 29-30; CP 71-75)

Over defense objection, the trial court allowed the State to present a written statement the alleged victim gave to police investigators shortly after the charged incident, under the prior consistent statement exception to the hearsay rule. (RP 303-06; Exh. 21) The trial court also denied Blakeney's request to instruct the jury on the elements of fourth degree assault, finding that it is not a lesser included offense of second degree rape. (RP 302-03, 317-20)

The jury convicted Blakeney as charged. (CP 27; RP 362) Blakeney stipulated to an offender score of four. (CP 44-46) The trial court sentenced Blakeney within the standard range to 130 months to life. (RP 376; CP 56) This appeal timely follows. (CP 77)

#### B. SUBSTANTIVE FACTS

In the early morning hours of October 19, 2011, F.M., who was homeless, was walking around downtown Tacoma looking for members of her family. (RP 67-68, 98, 101) A man approached and asked her, "What's up?" (RP 69) F.M. responded, "Not you." (RP 69) According to F.M., this angered the man, so he slapped her on

the back of her head with his hand. (RP 69)

F.M. testified that she fell to the ground, and tried to use her cellular phone to call 911. (RP 70) She testified that the man slapped the phone out of her hand, and began hitting her in the face with a closed fist. (RP 70) According to F.M., the man said, "I'm going to show you what we do to people like you." (RP 71-72) Then the man pulled down his pants and demanded that she perform oral sex on him. (RP 71-72) The man next demanded that she take off her pants, and he forced her to engage in vaginal intercourse. (RP 71-72) F.M. testified that she told the man to stop but he refused. (RP 73, 75) She was afraid for her safety because he threatened to hit her again if she did not comply or if she called for help. (RP 72-73, 106)

After the man ejaculated, he apologized to F.M. and told her that he was "not this kind of person." (RP 73, 76) After the man left, F.M. called 911 as she walked to St. Joseph's hospital. (RP 76; Exh. 1) A forensic nurse and responding police officers noted F.M.'s injuries, including a swollen and bloody lip and dried blood on her face.<sup>1</sup> (RP 224-25, 234, 242) F.M. appeared distraught and

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<sup>1</sup> The forensic nurse also noted a small laceration in F.M.'s genital area, which she testified was consistent with, but not necessarily the result of, a sexual assault. (RP 247, 252)

frightened as she spoke to the officers. (RP 225-26)

F.M. described the man to the responding police officers, and told them that the incident occurred on 9<sup>th</sup> Street near a church. (RP 75, 78, 113) The officers went to the location, and eventually found what appeared to be blood droplets and semen on the ground near a grassy area at South 9<sup>th</sup> and I Streets. (RP 114, 116, 118, 120) But the officers were unable to identify a suspect. (RP 188)

About two months later, F.M. was in Lakewood waiting to board a bus, when she saw the man she believed assaulted her. (RP 80-81) She pointed out the man to her companions, and they followed him and called the police. (RP 82) Police officers contacted the man that F.M. pointed out that day, and learned that his name was Willie Blakeney. (RP 189-90)

Detective Jennifer Quilio created a photographic display that included Blakeney's picture, and showed it to F.M. (RP 83, 190-91, 192) F.M. identified Blakeney as the man who assaulted her. (RP 86, 193-94) Nearly a year went by before a patrol officer recognized Blakeney walking along a Tacoma street, and took him into custody. (RP 129-30, 201)

Detective Quilio questioned Blakeney, and he denied having a problem with, or sexual contact with, a woman in the 9<sup>th</sup> and I Street

area. (RP 203, 204, 205) But DNA testing on the items collected from the scene matched Blakeney's DNA. (RP 179, 180)

Blakeney testified on his own behalf at trial. He acknowledged that he frequents the downtown Tacoma area because he can find prostitutes there. (RP 267-68) He testified that he approached F.M. thinking she was a prostitute, and she offered to perform oral sex in exchange for money. (RP 268, 269) He agreed, but became frustrated because she was not very good. (RP 270) He slapped her and told her she could do better. (RP 271) Then F.M. told Blakeney that he could have intercourse with her. (RP 272)

Blakeney testified that he thought he and F.M. had an agreement, and did not restrain her or threaten to kill her. (RP 269-70, 284)

#### **IV. ARGUMENT & AUTHORITIES**

Over defense objection, the trial court allowed the State to recall Detective Quilio in rebuttal to testify about statements F.M. made in an interview conducted shortly after the incident, and to present the written statement F.M. gave to police investigators. (RP 303-06, 308-16) In that interview and written statement, F.M. details the incident, and again states that Blakeney hit her, threatened her, and raped her without her consent. (RP 309-11; Exh. 21) The State



asserted, and the trial court agreed, that this hearsay evidence was admissible under ER 801, as a prior consistent statement rebutting a charge of fabrication. (RP 93, 303, 306, 315-16)

Whether a prior statement is admissible under ER 801 is within the trial court's discretion and will not be reversed absent a showing of manifest abuse of discretion. State v. Dictado, 102 Wn.2d 277, 290, 687 P.2d 172 (1984); State v. Osborn, 59 Wn. App. 1, 5, 795 P.2d 1174 (1990). ER 801(d)(1) provides, in relevant part:

**A statement is not hearsay if—**

(1) ***Prior Statement by Witness.*** The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is ... (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive[.]

While the witness' prior consistent statements are not admissible to prove that the in-court allegations are true, the statements are admissible to rebut a suggestion of recent fabrication. State v. Bargas, 52 Wn. App. 700, 702, 763 P.2d 470 (1988).

Prior out-of-court statements consistent with the declarant's testimony are not admissible if they simply reinforce or bolster the testimony. State v. Purdom, 106 Wn.2d 745, 750, 725 P.2d 622 (1986); State v. McDaniel, 37 Wn. App. 768, 771, 683 P.2d 231

(1984). That is because repetition is not a valid test for veracity.

State v. Harper, 35 Wn. App. 855, 857, 670 P.2d 296 (1983).

“Evidence which counteracts a suggestion that the witness changed his story in response to some threat or scheme or bribe by showing that his story was the same prior to the external pressure is highly relevant in shedding light on the witness’ credibility. Evidence which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force for the simple reason that mere repetition does not imply veracity.”

Osborn, 59 Wn. App. at 4-5 (quoting 4 J. WEINSTEIN & M. BERGER, *EVIDENCE* 801(d)(1)(B) at 801–150, 801–151 (1988)). Thus, it follows that “[i]n order for a statement to be admissible under ER 801(d)(1)(ii) for the purpose of counteracting a suggestion of fabrication, the statement must have been made *prior* to the events which gave rise to the inference of fabrication.” State v. Stark, 48 Wn. App. 245, 249, 738 P.2d 684 (1987) (emphasis in original).

In this case, F.M.’s prior consistent statements were first made in the hours after the alleged rape occurred. But the defense neither explicitly nor impliedly asserted that an event occurred after the alleged rape, and after F.M. made her prior statements about it, that caused F.M. to fabricate her testimony or that motivated F.M. to lie at trial. The defense simply cross-examined F.M. regarding

inconsistencies in her testimony, and later Blakeney testified that the sex acts were consensual. (RP 98-105, 269-72)

If the event that supposedly motivated F.M. to fabricate was the alleged rape itself, then the prior statements were made *after* that event, and cannot be used to rebut a claim of recent fabrication.

Any motive that F.M. had to fabricate or lie existed both at the time of the prior consistent statements and at the time of trial. Thus, the evidence did not rebut a claim of recent fabrication and instead merely served to improperly bolster F.M.'s trial testimony.

Further, a charge of recent fabrication can be rebutted by the use of prior consistent statements only if those statements were made under circumstances indicating that the witness was unlikely to have foreseen the legal consequences of his or her statements. State v. Makela, 66 Wn. App. 164, 168-69, 831 P.2d 1109 (1992) (citing State v. Epton, 10 Wn. App. 373, 377, 518 P.2d 229 (1974); State v. Bray, 23 Wn. App. 117, 125, 594 P.2d 1363 (1979)). In this case, F.M.'s statements were given in a written statement that was requested by a responding police officer and during an interview with a police detective. (RP 188, 230, 308) Thus, F.M. would have obviously foreseen the potential legal consequences of her statements.

The prior statements by F.M. to officer Quilio and in her written statement were not admissible under ER 801(d)(1)(ii). The trial court erred when it admitted the statements over defense objection. The error is not harmless, as they had the effect of bolstering F.M.'s credibility in a case where the outcome rested entirely on the jury's determination of credibility.

#### **V. CONCLUSION**

The trial court abused its discretion when it admitted F.M.'s prior consistent statements because there was no charge by the defense of recent fabrication, there was no assertion that an event occurred that motivated F.M. to lie at trial, and the legal consequences of F.M.'s prior statements were obvious at the time she made them. This prejudicial error requires that Blakeney's conviction be reversed and his case remanded for a new trial.

DATED: February 17, 2014

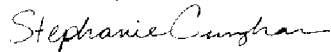


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#### **CERTIFICATE OF MAILING**

I certify that on 02/17/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Willie D. Blakeney, DOC# 931522, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**February 17, 2014 - 2:16 PM**

## Transmittal Letter

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